NO. 82-281

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

DAVID C. TREEN, et al.
Petitioners

versus

HAYES WILLIAMS, et al.
Respondents

On Petition For Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

George M. Strickler, Jr.
Tulane Law School
New Orleans, LA 70118

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OPINIONS BELOW

The opinion of Judge Frank J. Polozola of the Middle District of Louisiana, dated August 5, 1980, dismissing the damage claim by the individual plaintiffs is not reported, but is included in the appendix to the Petition for Certiorari (Appendix F). The opinion of the United States Court of Appeals for the Fifth Circuit affirming in part and reversing and remanding in part is reported, Williams, et al. v. Treen, et al., 671 F.2d 892 (1982), and is included in the appendix to the Petition for Certiorari in Appendix B. Rehearing was denied by the Court of Appeals in an unreported opinion on April 28, 1982. (Appendix A).

JURISDICTION

A timely petition for certiorari was filed in this matter. Respondents

do not contest the jurisdiction of the Court.

STATEMENT OF THE CASE

This action was filed in 1971 by four inmates of the Louisiana State Penitentiary at Angola against nine state officials ranging from the Governor of Louisiana to several security officers at the prison. The plaintiffs alleged that overall conditions at the prison constituted cruel and unusual punishment in violation of their rights under the Eighth and Fourteenth Amendments. Injunctive relief and damages were sought on behalf of a class of inmates. In addition, plaintiff Arthur Mitchell claimed that he had been intentionally deprived of medical treatment by prison officials as a means of punishing him in violation of his rights under the Eighth Amendment and the due process clause of the Fourteenth Amendment. Plaintiff Hayes Williams alleged that he had been punished without benefit of any trial, hearing or procedural due process.

A series of hearings on the injunctive aspects of the suit were conducted in 1973 and 1974. Based on evidence presented at those hearings, the district judge found that conditions at Angola would "shock the conscience of any right thinking person" and "flagrently violate[d] basic constitutional requirements as well as applicable state laws." He granted broad injunctive relief to remedy illegal conditions at the institution. Williams v. McKeithen, No. 71-98 (MD.La 1975) (Appendix K to Peitition for Certiorari). The Court of Appeals affirmed. Williams v. Edwards, 547 F.2d 1206 (5th Cir. 1977).

The district judge did not address the individual damage claims in the 1975 order. In his order dated June 10, 1975, the judge stated that "in accordance with the stipulation and consent of all parties, the suit involving the individual tort claims of the plaintiffs shall be tried and decided by the United States Magistrate..." (CA No. 71-98) (Appendix K to Petition for Certiorari at 110). The record reflects in years between 1975 and 1980 considerable activity with regard to implementation of the injunctive decrees, but no trial on the damage

claims was ever conducted.

On August 5, 1980, the attorney for the plaintiffs was awarded attorney fees for his successful prosecution of the case. (Appendix E to Petition for Certiorari). On August 6, 1980, the district judge, without any motion or request from defendants, suddenly dismissed the individual damage claims on the ground that the rights violated by the prison officials had not been "clearly established" at the times in question and that defendants were accordingly immune from liability under Procunier v. Navarette, 434 U.S. 555 (1978). (Appendix F to Petition for Certiorari). The plaintiffs' attorney promptly withdrew from the case. Two of the named plaintiffs, Hayes Williams and Arthur Mitchell, filed timely pro se notices of appeal.[1] Undersigned counsel was appointed by the Court of Appeals to brief and argue the cases for plaintiffs-appellants.

Noting that the district courts' dismissal of plaintiffs' claims had not followed an evidentiary hearing or been provoked by a motion for summary judgment, the Court of Appeals concluded that the district judge erred in deciding that defendants were entitled to the defense of qualified immunity without a factual basis for such a finding.

> In order to grant a qualified immunity, a district court must find that the defendnat officials' position required the exercise of discretion and that his allegedly tortious conduct was undertaken within the scope of his discretionary authority. These issues involve questions of fact which must be determined through the use of appropriate fact-finding procedures; i.e. summary judgment proceedings or an evidentiary hearing.
>
> In the instant case, the District Court held that all the defendants—from the individual jailers

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[1] The other two plaintiffs, Lee Stevenson and Lazarus Joseph, Jr., failed to notice appeals and the Court of Appeals ruled that the notices filed by Hayes and Mitchell could not be considered as satisfying the filing requirements for Stevenson and Joseph under Rule 4(a) of the Federal Rules of Appellate Procedure. Williams v. Treen, supra, 671 F.2d at 895.

> to the Governor—were immune from personal liability. The trial court reached this conclusion without ever explicitly finding that these state employees exercised discretionary authority, and without finding that the actions here in question were undertaken within the scope of that authority. In fact, the order of dismissal fails to even identify the supposedly immune defendants." Williams v. Treen, supra, 671 F.2d at 897 (footnotes omitted).

The Court of Appeals also noted that, not only was there no evidence on which the district judge could base a decision on qualified immunity, but the record was entirely void of any showing that defendants had ever claimed immunity, 671 F.2d at 896, n.6. Furthermore, the Court found "considerable confusion as to the identity of the defendants still in the case in 1980, the time when the dismissals were finally entered." 671 F.2d at 897, n.9. The Court of Appeals remanded the suits of Hayes and Mitchell, to allow them to put on evidence in support of their claims and, presumably, to allow those defendants still in the case to claim and make out the defense of qualified immunity. But because of the ruling of the district court that the constitutional rights of the plaintiffs had not been "clearly established" in 1970, the Court of Appeals went on to hold that a prison official who had acted in violation of clearly established state law (such as the prisons own regulations) could not claim an immunity based on reasonable good faith. 671 F.2d at 900.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Defense of Qualified Immunity Was Not Properly Raised in the Courts Below

Qualified or "good faith" immunity is an affirmative defense that must be pleaded by the defendant official. Gomez v. Toledo, 446 U.S. 635 (1980). As noted by the Court of Appeals, not only did the district court dismiss the plaintiffs' damage claims ex parte without a motion from defendants, but the defendants have never claimed immunity of any kind for their actions. 671 F.2d at 896, n.6.

The only question raised in the petitioners' application is whether they are entitled to the qualified immunity defense even though their actions violated established state laws and regulations. Certainly this Court should not agree to decide that issue on the merits if the defendants have waived their right to raise any immunity defense. If, on the other hand, the defendant officials may belatedly claim the defense, that question should be first addressed by the district court which will have the opportunity to consider evidence on the reasons for the failure of defendants to plead or otherwise invoke the defense. Nothing in the Court of Appeals opinion precludes an attempt by the defendants from raising the defense by motion on remand.

2. Review of the Court of Appeals Decision at this Time on this Record Would be Premature and Unnecessary

Because no evidentiary hearing has ever been conducted on the plaintiffs' damage claims, whether it will even be necessary for the defendants on remand to invoke a qualified immunity or other defense is purely speculation. The Court of Appeals had to address the immunity issue because of the grounds of the district court's dismissal. But the holding of the Court of Appeals that defendants will not be able to rely on the alleged uncertain state of federal law at the time of their actions is not equivalent to a finding that any defendant will be liable for damages or that any defendant will be deprived of a defense. If, for example, the plaintiffs failed to prove their claims there would be no need for the district court to ever reach the qualified immunity issue and, even were the plaintiffs to satisfy their burden of proof, the defendants may have defenses other than qualified immunity that will dispose of their liability. Review of the Court of Appeals decision at this time on this record would result in an unnecessary advisory opinion.

3. The Record In This Case Is a Totally Inadequate Basis For A Decision on the Merits of the Qualified Immunity Issue

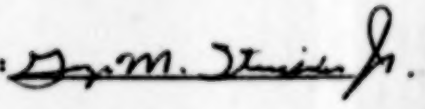
Even were the Court to assume that some of the individual defendants would be held liable for damages unless they were able to successfully raise the "good faith" defense, the Court should nevertheless deny the writ. Because there is no record on the damage issue other than the initial pleadings (which contain no claims of qualified immunity), the Court will have no way to evaluate the extent of discretion exercised by the defendants or of their knowledge of the relevant statutes or state regulations. Indeed, there is absolutely no record demonstrating that these defendants exercised the kind of discretionary powers which would entitle them to the protection of qualified immunity. See, Harlow v. Fitzgerald, ____U.S.____, 102 S.U. 2727, 2738 (1982). This Court should not answer important legal questions without a factual background showing how the answers will affect the case at hand. Article III of the Constitution demands no less.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be denied.

Respectfully submitted,

George M. Strickler, Jr.
Tulane Law School
New Orleans, LA 70118

BY: 

CERTIFICATE OF SERVICE

I hereby certify that I mailed three copies of the foregoing Opposition To Petition For Certiorari, first class postage prepaid, on this 2nd day of December, 1982 to:

J. MARVIN MONTGOMERY
Assistant Attorney General
Louisiana Department of Justice
1885 Wooddale Blvd., Suite 1218
Baton Rouge, LA 70806-1590

George M. Strickler, Jr.

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MOTION OF RESPONDENTS TO
PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53(1) of the Rules of this Court, motion is hereby made that the respondents be allowed to proceed in forma pauperis before this Court for the reason stated in the attached affadavit.

Respectfully submitted,

George M. Strickler, Jr.
Tulane Law School
New Orleans, LA 70118

CERTIFICATE OF SERVICE

I hereby certify that I mailed three copies of the foregoing Motion of Respondents To Proceed In Forma Pauperis, first class postage prepaid, on this 2nd day of December, 1982 to:

J. MARVIN MONTGOMERY
Assistant Attorney General
Louisiana Department of Justice
1885 Wooddale Blvd., Suite 1218
Baton Rouge, LA 70806-1590

George M. Strickler, Jr.

AFFADAVIT

PARISH OF ORLEANS
STATE OF LOUISIANA

GEORGE M. STRICKLER, JR., being duly sworn, deposes and says:

1. I am the attorney for the respondents, Hayes Williams and Arthur Mitchell. I was appointed to represent them by the Court of Appeals for the Fifth Circuit after they had filed timely pro se notices of appeal from the dismissal of their case by the district court. Both respondents are presently incarcerated in the Louisiana State Pentitentiary at Angola where they have been inmates since before 1971.

2. To the best of my knowledge and belief, neither respondent is able to pay or give security for the fees and costs associated with this proceeding.

Before me on this ____ day of
December, 1982

Notary Public

George M. Strickler, Jr.